SII TOH SIONG

v.

HUNG MING CHUNG

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CIVIL APPEAL NO: 11-2-99]
21 JANUARY 2000

CIVIL PROCEDURE: *Appeal - Record of Appeal - Order 49 r. 6(3)(d) Subordinate Courts Rules 1980 - Meaning of "decision"- Whether means sealed judgment - Whether copy of draft order suffices - Whether rule mandatory*

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Whether must be given - Preliminary objection on point of law - Whether goes to root of proceedings - Illegality - Jurisdiction of court*

On the day fixed for the hearing of the appeal, counsel for the respondent raised a preliminary objection without giving any prior notice to the appellant. The preliminary objection was that the record of appeal was defective for failure to comply with the requirements of O. 49 r. 6(3)(d) Subordinate Courts Rules 1980, since it did not contain a copy of the decision of the court appealed from, but a copy of the draft order.

Held:

[1] A preliminary objection on a point of law can be raised even though no prior notice of it is given as any preliminary objection raised can go to the root of the matter such as illegality in the proceedings taken. The court cannot condone illegality simply because no prior notice of a preliminary objection is given.

[2] The word "decision" in O. 49 r. 6(3)(d) Subordinate Courts Rules 1980 can only mean a sealed judgment, *ie*, a judgment that has been drawn and entered in accordance with O. 29 rr. 9 & 10 Subordinate Courts Rules 1980.

[3] Order 49 r. 6(3) Subordinate Courts Rules 1980 is mandatory in its terms by reason of the word "shall" used in it. Therefore, it is mandatory for the record of appeal to contain the decision appealed from.

[4] Rule 18(4) Rules of the Court of Appeal 1994 had no application in this case.

[Preliminary objection upheld; appeal dismissed.]

Case(s) referred to:
Datuk Bandar Kuala Lumpur v. Seman Amat And Other Cases [1996] 3 CLJ 263 ***(foll)***
Ho Shee Chit & Anor v. Bruusgaard Kisteruds Skibsaksjeselkap & Anor [1982] 2 MLJ 35 ***(refd)***
Interfinance Bhd v. Grand Ridge Sdn Bhd & Ors [1998] 4 CLJ Supp 485 ***(refd)***
Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 395 ***(refd)***
Malaysia Building Society Bhd v. Chee Eng Shot [1990] 1 CLJ 97 ***(refd)***
Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 ***(foll)***
Nikodo (S) Pte Ltd v. GVC Karaoke Sdn Bhd [1997] 2 CLJ 906 ***(refd)***
Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(refd)***
Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Bhd [1996] 2 CLJ 130 ***(refd)***
Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd [1994] 1 CLJ 412 ***(refd)***
United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors [1993] 3 CLJ 612 ***(refd)***
United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd [1993] 4 CLJ 191 ***(refd)***
Wong Sing Ha v. Yii Ching King (Civil Appeal No 20-12-13 of 1996; High Court, Sibu) ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18(4)
Subordinate Courts Rules 1980, O. 29 rr. 9, 10, O. 49 r. 6(3)(d)

Other source(s) referred to:
Mallal's Digest, 4th edn, 1998 Reissue, vol 2(2), para 3823

For the appellant - John Shek; M/s John Shek & Co
For the respondent - Wong Ho Leng; M/s Wong Ho Leng & Co

Reported by Izzaty Izzuddin

JUDGMENT

Tee Ah Sing J:

In this case the appellant's application to enter summary judgment against the respondent was dismissed by the learned magistrate and the appellant appealed to the High Court.

Before the hearing of the appeal, the learned counsel for the respondent raised a preliminary objection on the record of appeal filed by the appellant pursuant to O. 49 r. 6(3) of the Subordinate Courts Rules 1980 ("the SCR"). Though O. 49 r. 6(3) requires that the record of appeal shall contain, *inter alia*, a copy of the decision appealed from, the record of appeal of the appellant instead contained only a draft copy of the order of the learned magistrate which is in pp. 36 to 37 of the record of appeal. The objection raised is that the said record of appeal is defective as it does not comply with the requirement of O. 49 r. 6(3)(d) of the SCR as it does not contain the decision of the court appealed from but only a draft order which is not the decision. In support the following cases were cited:

(1) *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130.

(2) *Mat Yassin bin Dollah v. Ibrahim bin Hussin & Anor.* [1996] 4 CLJ 395; [1997] 2 MLJ 681.

(3) *Wong Sing Ha @ Wang Ha Hing (trading as Ying Nang Company) v. Yii Ching King (trading as Soon Kwong Shipping Company)* – Sibu High Court Civil Appeal No. 20-12-13 of 1996 (unreported).

The learned counsel for the appellant contended that for a counsel to raise preliminary objection a notice of such objection must be served on the other side specifying the grounds of such objection. In the present case no such notice has ever been given and this action caught the appellant by surprise as the appellant would not be able to answer such objection without proper authorities. For this alone, the preliminary objection should be dismissed with costs. Secondly, in this appeal no doubt it is called appeal but as a matter of fact it is a rehearing of the application. And this is why no petition of appeal is necessary. He also stated that he did not have the authority and he needed time to look into the authority to support his argument.

So the court adjourned the matter to 13 September 1999 for continuation of submission.

On 13 September 1999 the learned counsel for the appellant tendered a written submission. In the written submission it was contended, *inter alia*, as follows:

1. The courts in the past in dealing with the point of preliminary objection had stipulated that a party who wished to raise a preliminary objection should give prior notice at the earliest moment possible to the other party. Inexplicably, the intention is to avoid any element of surprise. In support the following were cited:

(a) *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor.* [1985] 1 MLJ 395 at 396.

(b) *Mallal's Digest* (4th Edn) (1998) Reissue Vol. 2(2) at para. 3823.

(c) *Interfinance Bhd. v. Grand Ridge Sdn. Bhd. & Ors.* [1998] 4 CLJ Supp. 485.

The respondent had admitted that no prior notice of objection either orally or in writing had ever been given to the appellant prior to the date of hearing of this appeal. As such the respondent had waived his right to raise the preliminary objection.

2. In the alternative, it was submitted that if this court does not agree with the decisions enunciated in the aforesaid authorities the requirement under O. 49 as purely directory as the present case was still in the interlocutory stage and had not gone for trial.

Therefore the appeal in the present case is to be done by rehearing of the instant case. In support the following cases were cited:

(a) *Malaysia Building Society Berhad v. Chee Eng Shot* [1990] 1 CLJ 97.

(b) *Tiong Hung Ming v. Kalimantan Hardwood Sdn. Bhd.* [1994] 1 CLJ 412; [1994] 3 MLJ 656.

(c) *United Malayan Banking Corporation Bhd. v. Pembinaan KSY Sdn. Bhd. & Ors.* [1993] 3 CLJ 612; [1993] 3 MLJ 45.

(d) *United Overseas Bank Ltd. v. Heap Huat Rubber Co. Sdn. Bhd.* [1993] 4 CLJ 191.

(e) *Ho Shee Chit & Anor. v. Bruusgaard Kisteruds Skibsaksjeselkap & Anor.* [1982] 2 MLJ 35.

(f) *Nikodo (S) Pte. Ltd. v. GVC Karaoke Sdn. Bhd.* [1997] 2 CLJ 906; [1997] 2 MLJ 742.

3. Moreover, the appellant had his utmost best to include a draft order in the record of appeal. That was done because no sealed order could be obtained in time. The plaintiff did this in accordance with r. 18(4) of the Court of Appeal Rules 1994.

In reply the learned counsel for the respondent submitted that there was no more element of surprise in issue when the question under O. 49 r. 6 of the SCR as to the inclusion of specific documents is a matter of law and the provision has been there for many years. Even if there was surprise it was confined to the hearing on 9 August 1999. It is also not the law that failure to give prior notice of preliminary objection amounts to waiver or shut the door for the intended objector. In support the cases of *Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors.* [1997] 5 CLJ 421; [1997] 2 MLJ 344 and *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases* [1996] 3 CLJ 263 were cited.

If the decision appealed from is not included, the appeal is not proper, then the court cannot hear this appeal.

I shall now deal with the preliminary objection.

The preliminary objection was only raised during the date of hearing itself on 9 August 1999. So there was no notice of the preliminary objection whether written or oral given to the appellant.

In *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases* [1996] 3 CLJ 263 His Lordship Abdul Kadir Sulaiman J at p. 266 said:

> Before the formal hearing of the three appeals, the learned counsel for the respondents, En. Karpal Singh raised a preliminary objection on a point of law in that as the various appeals of the appellants were filed in the registry of the Subordinate Court the appeals are not properly brought before the High Court being in contravention of O. 49 r. 6 of the SCR. It is contended that the notices of appeal were not filed in the proper registry as required by the said r. 6. Rather unfortunate, however, no prior notice of the intention to raise the preliminary objection was given by the respondents to the appellants except for the indication given to their learned counsel orally just before the commencement of the hearing of the appeals.

And at p. 267 he said:

> In opposition, the learned counsel for the appellants cited *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor.* [1985] 1 MLJ 394. In that case the sole question for decision of the court concerned the meaning and ambit of the phrase "entered for hearing" in O. 53 r. 2 of the Rules of the High Court 1980 (the RHC). It arose on a preliminary objection taken by the respondent without any prior notice given to an application by the applicant for an order of *certiorari*. By way of observation his Lordship at p. 396 said:

> Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, CJ in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

However, in that case, even though no prior notice was given, the learned judge heard the preliminary objection of the respondent though for lack of merit he dismissed the objection raised.

In *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] 28 MLJ 370, the respondents upon the service of the notice of appeal by the appellant out of the time period prescribed, issued "Notice of Preliminary Objection" in writing to the appellant that on the hearing of the appeal which was to take place in about 3 1/2 months from then, he would apply for the appeal to be dismissed on the grounds that they were not served with the notice of appeal within the time limited for appeal whereby the appellant was in breach of the then O. 58 r. 1A(1), O. 58 r. 2 and O. 58 r. 15 of the RSC 1957. The then Court of Appeal allowed the preliminary objection and the appeal by the appellant was struck out with costs to the respondent. At p. 371 Thomson CJ has this to say:

> Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *In re Helsby*.

And at p. 268 he said:

> In that light I would agree with the submissions made by En. Karpal Singh, the learned counsel for the respondents, that the observations made in the two cases cited are merely *obiter*, as the two Courts were deciding on the issue raised in the two respective preliminary issues. Furthermore, the learned judge in *Jasabena's* merely expressed that it was unfortunate that the respondent in that case had raised the objection without any prior notice. In my view, it is a good practice for a party intending to raise any preliminary objection to do so by giving prior notice in writing to avoid any further argument as to whether in fact any notice at all ever given and that the notice if given must be with prior notice so that the other party would not be taken by surprise. The opponent must be given the opportunity to prepare himself to answer to the objection to be raised. This objective is achieved by him being given ample notice of the nature of the objection to be raised. In this present case, though an eleventh hour oral notice was

given, the learned counsel for the respondent is not pressing for an immediate reply to the objection to be raised. He is prepared to allow time for the learned counsel for the appellant to do so which the learned counsel, however, did not avail the opportunity given but instead gave his reply straightaway. Therefore, he cannot any more say that he was taken by surprise by the eleventh hour oral notice of the preliminary objection to be made. It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for the prior notice is merely to avoid surprise. But if by the conduct of the opponent it can be inferred that no surprise to him has been caused as in this present case, the objector should be allowed to raise the intended preliminary objection even without any notice as was done in *Jasabena's* case itself. Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection. Having heard the arguments by the two parties, I allowed the learned counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellants.

I am in agreement with his Lordship Abdul Kadir Sulaiman as aforesaid.

It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. I am of the view that a preliminary objection on a point of law can be raised even though no prior notice of preliminary objection is given as any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection.

Having heard the arguments by the two parties, I allow the learned counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellant.

Rule 18(4) of the Court of Appeal Rules 1994 has no application to our case.

In the record of appeal (at pp. 36 to 37) there is an undated draft order of the learned magistrate. In the record of appeal there is no sealed copy of the judgment. I am of the view that the word "decision" in O. 49 r. 6(3)(d) of the SCR could only mean the sealed judgment, that is to say, a judgment that is drawn and entered in accordance with O. 29 rr. 9 and 10 of the SCR. (See *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130).

In *Mat Yassin bin Dollah v. Ibrahim bin Hussin & Anor.* [1997] 2 MLJ 681 His Lordship Nik Hashim JC at p. 684 said:

> Order 49 r. 3A(1) is mandatory in its terms by reason of the word 'shall' in the rule (see *Datuk Bandar Kuala Lumpur v. Seman bin Amat and Other Cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose any one of the items in the record as required by the rule, in my view, will render the appeal record defective. It has been said time and again that rules of court must be obeyed (*Ratnam v. Cumarasamy & Anor.* [1965] 1 MLJ 228) and must be meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1995] 2 CLJ 152 at p. 154). Failure to comply with them will lead to chaos in the conduct of litigation (*Sykt. Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 MLJ 420 at p. 423, per Eusoff Chin SCJ (as he then was)).
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> Thus, without the decision and following *Teoh Soon Kok's* case, I hold that the appeal record in the present case was not properly before the court. The record suffered from a serious defect for not being in compliance with the strict rules of O. 49 r. 3A(1)(d) of the SCR.

I am of the view that O. 49 r. 6(3) of the SCR is mandatory in its terms by reason of the word 'shall' in the rule. So it is a mandatory requirement for the record of appeal to contain the decision appealed from.

It is trite law that an appeal under O. 49 r. 6(3) of the SCR is by way of rehearing before the judge in chambers. However, the judge in chambers can only hear the appeal by way of rehearing if the record of appeal has complied with the strict rules of O. 49 r. 6(3) of the SCR.

In the result, the record of appeal without the decision is incomplete. I hold that the record of appeal in the present case was not properly before the court and this court has no jurisdiction to hear this appeal.

For the reasons stated, I uphold the preliminary objection and I dismiss the appeal with costs to be taxed unless agreed.

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